Minority Views to H. Res. 132, a resolution to reaffirm the reference to one Nation under G-d in the Pledge of Allegiance

H. Res. 132 is a response to the 9th Circuit's decision in *Newdow v. U.S. Congress I*[1] and *Newdow v. U.S. Congress II.*[2] In these rulings, the 9th Circuit held that daily voluntary[3] recitation of the pledge violated the Establishment Clause of the Constitution.[4] Both the House of Representatives and the Senate passed resolutions in the 107th Congress immediately after the Court handed down its decision in *Newdow I.* H. Res. 459 passed by a vote of 416-3, and S. Res. 292 passed by a vote of 99-0.[5] The current resolution is in response to *Newdow II*, recently released on February 28, which reaffirms the first holding and denies all petitions for rehearing on the issue.

Although the 9th Circuit has held that the Pledge violates the Establishment Clause, the only other Circuit to have considered the question, the 7th Circuit, has upheld the language of the Pledge, including the 1954 amendment.[6] Although the proposed legislation cites Supreme Court

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[1] 292 F.3d 597 (9th Cir. 2002). http://www.ca9.uscourts.gov/ca9/newopinions.nsf/FE05EEE79C2A97B688256BE3007FEE32/$file/0016423.pdf?openelement

[2]No. 00-16423 (9th Cir., February 28, 2003)

[3] Mandatory recitation of the Pledge was struck down by the Supreme Court in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943).

[4]The Court wrote, "[t]he Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Newdow I* at 9124. The 9th Circuit, relying on the Supreme Court's voluntary school prayer jurisprudence stated, "the phrase 'one nation under G-d' in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and – since 1954 – monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of G-d. A profession that we are a nation 'under G-d' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no g-d,' because none of these professions can be neutral with respect to religion." *Id.* at 9123.

[5]H. Res. 459, 107th Cong., 148 Cong. Rec. H4125-4136 (June 27, 2002); S. Res. 292, 107th Cong., 148 Cong. Rec. S6105-6106 (June 26, 2002).

[6] *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992).

dicta on the subject of the Pledge and the national motto, the Court has never squarely considered the question of the constitutionality of the voluntary recitation of the Pledge in schools.

We voted for the resolution at Committee because we believe the Ninth Circuit Court of Appeals ruling runs counter to the spirit and precedent surrounding the First Amendment. As Members with great respect and reverence for our pledge of allegiance, we don't believe its recitation substantively infringes on freedom of religion.

H. Res. 132 should not be interpreted as a means of discrediting the judiciary. When Members of Congress argue, as they did last Congress, that a decision was written by "radical secularists" and others make assertions concerning the judiciary creating a "G-dless society" little room is left for fair and reasoned debate**. [insert cites from last year's debate – from pickering and others]** However, it should be noted that other judicial rulings have been much more objectionable and destructive to the ideals of our Constitution; for example, the Supreme Court ruling in *Bush v. Gore* in which Five Republican political appointees contorted the equal protection clause to stop the counting of votes.[7] Although the Majority now decries judicial activism, there was no resolution on the floor in condemnation of that.

In addition, last June, the Supreme Court ruled in *Zelman v. Simmons-Harris* that taxpayer funds can be used in voucher programs to support parochial schools.[8] This ruling has been called the worst church-state ruling in 50 years. The Supreme Court also upheld random drug testing of high school students who participate in extracurricular activities in *Board of Education v. Earls*, including those students who are not suspected of any wrongdoing.[9] Its hard to imagine an opinion that is more objectionable from a privacy standpoint. But again, we doubt we will see a congressional referenda on those decisions any time soon.

We also take great issue with my friends who came to the House Floor claiming that this is a shocking sign of some fundamental defect in the judiciary. Unlike *Bush v. Gore*, this decision can be appealed, where it will likely be overturned. This is but one step in the judicial process, a process that usually and ultimately gets it right. Just as *Plessy v. Ferguson*[10] (upholding separate but equal) was eventually overturned by *Brown v. Board of Education*[11], and *Penry v. Lynaugh*[12]

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[7] *Bush v. Gore*, 531 U.S. 98 (2000).

[8] *Zelman v. Simmons-Harris*, No. 00-1751(2002).

[9] *Board of Education of Independent School District No. 92 of Pottawatomie County et. al. v. Earls et al.*, No. 01-332 (2002).

[10] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[11] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[12] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

(permitting execution of the mentally retarded) was overridden by *Atkins v. Virginia*[13], we have seen that the courts have often lost their way only to find it again

We are also concerned about new language inserted in this Congress' resolution that states "the President should nominate and the Senate should confirm Federal circuit court judges who interpret the Constitution consistent with the Constitution's text." In one sense, this new language is a truism – obviously the Constitution needs to be read consistent with its text. That is what judges do. We hope this is not read as some sort of a litmus test that sitting judges and other potential nominees had better tailor their constitutional views to a particular or a narrow view of the Constitution.

Lost in our debate on H. Res. 132 is the value of our judicial system, the crown jewel of our democracy. If there is any single idea in the Constitution that has separated our experiment in democracy from all other nations, it is the concept of an independent judiciary.

The Founding fathers, in their great wisdom, created a system of checks and balances. Independent judges with lifetime tenure were given the tremendous responsibility of interpreting the constitution. It is no surprise that over the years, it is the judiciary, more than any other branch of our government, that has served as the protector of our precious civil rights and civil liberties over the years. We agree with Alexander Hamilton that the "independent spirit in the judges" enables them to stand against the "ill humors of passing political majorities."**[cite]**

The fact that the Ninth circuit appears to have gone astray does nothing to diminish our respect for our Judiciary.

John Conyers, Jr.

[13] *Atkins v. Virginia*, No. 00-8452 (2002).